Supreme Court, U. S.
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No. 79-42

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANNE M. PAVILONIS, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Under the Emergency School Aid Act (ESAA), 20 U.S.C. 1601-1619, the Secretary of Health, Education, and Welfare may award federal grants to local school authorities to help finance programs adopted as part of a desegregation plan; among the special programs eligible for ESAA grants is a program of individualized instruction.

Petitioner filed this action in the United States District Court for the District of Massachusetts, claiming that Boston school officials improperly denied individualized instruction to her two sons. She contended that this instruction was denied because the school to which her sons are assigned is a control group for purposes of comparison with a magnet school that has individualized

instruction. Petitioner contended that HEW's regulations, by allowing local school authorities to create control groups such as the one which allegedly has resulted in the denial of individualized instruction to her sons, are in violation of ESAA and the Fourteenth Amendment. Petitioner requested a change in the regulations and damages in the millions of dollars.

The district court granted the government's motion to dismiss on the ground that petitioner had not stated a cause of action under 42 U.S.C. 1983 (Pet. App. 16-17). The court of appeals summarily affirmed sua sponte, observing the "[a]ppellant's pleadings and motions, comprised of vague and conclusory allegations, fail to state a claim for relief under any of the civil rights statutes which could even arguably be applicable to her claims" (Pet. App. 14-15). Petitioner's "motion to reverse" was treated as a motion for rehearing; the court of appeals denied the motion on the ground that "[n]either the Emergency School Aid Act * * * nor the Constitution requires [respondent] to issue the regulations [petitioner] desires" (Pet. App. 13).

The decision of the court of appeals is correct and does not merit review by this Court. Petitioner's particular complaints about the actions of respondent have never been clear. Assuming that her complaint is that the Secretary must promulgate regulations forbidding the designation of schools as control groups for purposes of comparison to, and evaluation of, magnet schools, the court of appeals correctly held that the Secretary's failure to do so does not violate any of petitioner's statutory or constitutional rights.[1]

[1]Petitioner argued below that the regulations conflict with ESAA (see Pet. 2). But Section 710(a)(15) of ESAA, 20 U.S.C. 1609(a)(15), requires that grantees adopt "procedures * * * for the continuing evaluation of programs, * * * including, where appropriate, comparisons with proper control groups composed of persons who have not participated in such programs or projects * * *."

Petitioner focuses on "the constitutionality of race-conscious allocation of education funds" (Pet. 10)—a matter raised for the first time in the petition—but she has never indicated in this action how the use of control schools makes ESAA grants in Boston a "race-conscious" allocation of funds. Indeed, petitioner recognizes that Boston's magnet schools have the same racial and economic make-up as regular schools (Pet. 7). Moreover, Boston is subject to a desegregation order under which race-conscious remedies are allowable under *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). See *Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); *Morgan* v. *Kerrigan*, 530 F. 2d 401 (1st Cir.), cert. denied, 426 U.S. 935 (1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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